IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

RONNIE SARTIN, Petitioner, v. HON. HOWARD HANTMAN, Judge of the Superior Court of the State of Arizona, in and for the County of Pima, Respondent, THE STATE OF ARIZONA, Real Party in Interest.	2 CA-SA 2006-0108 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

SPECIAL ACTION PROCEEDING

Pima County Cause No. CR-61619

JURISDICTION ACCEPTED; RELIEF GRANTED IN PART

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P E L A N D E R, Chief Judge.

¶1 Petitioner Ronnie Sartin seeks special action relief from the respondent judge's denial of Sartin's motion to remand the underlying criminal case to the grand jury pursuant to Rule 12.9, Ariz. R. Crim. P., 16A A.R.S. For reasons explained below, we accept jurisdiction of the special action and grant relief in part by directing the respondent judge to analyze and determine the issue of prejudice.

¶2 Sartin was indicted in May 1998 on one count of premeditated first-degree murder. A few months before, while instructing the grand jury on the law, the prosecutor stated: "What premeditation is is having the intention or knowledge that you're going to kill another human being long enough before the act of killing to permit you time to reflect. That can be as quick as successive thoughts of the mind." Similarly, the prosecutor instructed the grand jurors that premeditation exists "so long as there's an opportunity to reflect."

¶3 In July 1998, Sartin moved to remand the case pursuant to Rule 12.9, Ariz. R. Crim. P. He argued, inter alia, the prosecutor had misinstructed the grand jurors on the law of premeditation,[1] permitted "misstatements of the evidence," and "failed to present clearly exculpatory evidence." In August 1998, the trial court (Judge Alfred) denied the

[1]In support of that argument, Sartin relied on *State v. Ramirez*, 190 Ariz. 65, 945 P.2d 376 (App. 1997). Although this court disagreed with *Ramirez* in *State v. Haley*, 194 Ariz. 123, 978 P.2d 100 (App. 1998), *Haley* was decided after the grand jury proceedings were held in this case. In addition, our supreme court later abrogated *Haley* and disapproved any statements in jury instructions on premeditation that "'proof of actual reflection is not required'" or that premeditation may be "'as instantaneous as successive thoughts of the mind.'" *State v. Thompson*, 204 Ariz. 471, ¶ 32, 65 P.3d 420, 428 (2003).

motion to remand. Thereafter, Sartin petitioned this court for special action relief, and this court apparently declined jurisdiction of the petition.[2]

¶4 After a jury trial in 1999, Sartin was convicted of first-degree murder and sentenced to a prison term of natural life. This court affirmed the conviction and sentence on appeal. *State v. Sartin*, No. 2 CA-CR 99-0543 (memorandum decision filed Feb. 8, 2001) (*Sartin I*). Ultimately, however, this court granted review and relief on Sartin's petition for review of the trial court's (Judge Eikleberry's) order denying relief on claims Sartin raised in his second petition for post-conviction relief under Rule 32, Ariz. R. Crim. P., 17 A.R.S. *State v. Sartin*, No. 2 CA-CR 2005-0135-PR (memorandum decision filed March 30, 2006) (*Sartin II*). There, this court concluded that our supreme court's decision in *State v. Thompson*, 204 Ariz. 471, 65 P.3d 420 (2003), was "a significant change in the law for purposes of Rule 32.1(g) and was entitled to retroactive application." *Sartin II*, No. 2 CA-CR 2005-0135-PR, ¶ 8. In addition, this court found that the jury instruction on premeditation at trial had "contained some of the language the supreme court rejected in *Thompson*" and that "[t]he prosecutor [had] told the jury precisely what the supreme court found most objectionable in *Thompson*." No. 2 CA-CR 2005-0135-PR, ¶¶ 9, 10. Accordingly, this court granted post-conviction relief and remanded the case to the trial

[2]We have confirmed that Sartin filed a petition for special action with this court in 1998, bearing this court's number 2 CA-SA 98-0111. But the court does not have direct or easy access to that file now, nor has Sartin furnished any materials relating to that special action, including the transcript of the grand jury proceedings that resulted in his indictment in May 1998.

court to determine anew, using the correct standard applied in *Thompson*, whether prejudicial *Thompson* error had occurred. No. 2 CA-CR 2005-0135-PR, ¶¶ 12-15.

¶5 On remand, in July 2006, the trial court (Judge Eikleberry) concluded that the evidence of premeditation at trial was "not so overwhelming that the Court can find, beyond a reasonable doubt, that the prosecutor's closing arguments did not affect or contribute to the verdict." Having found that the *Thompson* error was not harmless, the trial court set aside Sartin's conviction and sentence and referred the case for reassignment and a new trial.

¶6 Sartin then filed a motion to remand the case to the grand jury for a new determination of probable cause based on the incorrect instruction on premeditation the grand jury had received in 1998.[3] At argument on the motion, the state contended Sartin was "eight years late filing the motion" and previously had unsuccessfully litigated in his 1998 motion to remand "the very same issues he now presents to the Court." Noting that "[t]he issue is ultimate timeliness" and that "there is no basis [i]n the existing rules" to allow a Rule 12.9 motion to be filed after post-conviction relief is granted, the respondent judge denied Sartin's motion. This special action followed.

¶7 In order to obtain review of a trial court's denial of a motion to remand for a redetermination of probable cause, "a defendant must seek relief before trial by special action." *State v. Murray*, 184 Ariz. 9, 32, 906 P.2d 542, 565 (1995); *see also State v.*

[3]Sartin has not furnished this court his motion to remand the case or any other documents relating to that, other than the transcript of the November 20, 2006, hearing on his motion.

Moody, 208 Ariz. 424, ¶ 31, 94 P.3d 1119, 1134-35 (2004); *State v. Gortarez*, 141 Ariz. 254, 258, 686 P.2d 1224, 1228 (1984) (trial court's ruling on challenge to grand jury's finding of probable cause not reviewable by appeal, but rather, must be pursued by special action). Accordingly, we accept jurisdiction of the special action because Sartin has no "equally plain, speedy, and adequate remedy by appeal." Ariz. R. P. Spec. Actions 1, 17B A.R.S.

¶8 A defendant may challenge grand jury proceedings and move for a new finding of probable cause if he or she "was denied a substantial procedural right." Ariz. R. Crim. P. 12.9(a). Any such motion, however, "may be filed . . . no later than 25 days after the certified transcript and minutes of the grand jury proceedings have been filed or 25 days after the arraignment is held, whichever is later." Ariz. R. Crim. P. 12.9(b). Although that time frame is not technically "jurisdictional," *Maule v. Arizona Superior Court*, 142 Ariz. 512, 515, 690 P.2d 813, 816 (App. 1984), "[a] defendant waives his objections to the grand jury proceeding by failing to comply with the timeliness requirement." *State v. Smith*, 128 Ariz. 243, 248, 599 P.2d 199, 204 (1979); *see also State v. Mulligan*, 126 Ariz. 210, 213, 613 P.2d 1266, 1269 (1980).

¶9 This is not a case, however, in which the defendant "failed to timely challenge the grand jury indictment[]." *Mulligan*, 126 Ariz. at 213, 613 P.2d at 1269. Rather, Sartin apparently filed a timely motion to remand in 1998 and unsuccessfully petitioned for special

action relief from the trial court's denial of that motion.[4] And, as the state acknowledged below, the issue raised in 1998 on the premeditation instruction (albeit without the benefit of *Thompson*) is "the very same" as that urged in Sartin's recent motion to remand. Under these unique circumstances, and in view of the procedural history of the underlying case, we do not find Sartin's 2006 motion to remand untimely or his grand jury challenge waived. *See Korzep v. Superior Court*, 172 Ariz. 534, 536, 838 P.2d 1295, 1297 (App. 1991) (finding in special action proceeding "no waiver" of petitioner's request for new grand jury proceeding "because the Supreme Court's reversal of her conviction and remand places her back in a pre-trial posture").

¶10 On the merits, Sartin argues he is entitled to a new determination of probable cause because "[t]he law on premeditation has changed [after *Thompson*] and as such the grand jury in [his] case was incorrectly instructed." As noted earlier, the respondent judge denied the motion to remand after finding "no basis [i]n the existing rules" for it. Although Rule 12.9 does not expressly address the situation presented here, *Korzep* lends support to Sartin's argument. There, as here, several years after she had been indicted, the petitioner sought special action review of the trial court's denial of her second motion to remand the

[4]Although the indictment against Sartin was returned on May 22, 1998, and his first motion to remand was filed July 13, 1998, the trial court (Judge Alfred) did not expressly deny the motion based on untimeliness. And the state has not argued, nor did the respondent judge rule, that Sartin's 1998 motion was untimely. Although we cannot tell from the limited record before us, it is possible Sartin timely sought and obtained an extension to file his first motion to remand, even if he was required to do so. *See Maule v. Ariz. Superior Court*, 142 Ariz. 512, 515, 690 P.2d 813, 816 (App. 1984).

case to the grand jury. 172 Ariz. at 535, 838 P.2d at 1296. Previously, in the underlying criminal case, the trial court had denied Korzep's first motion to remand based on failure to instruct the grand jury on A.R.S. § 13-411. 172 Ariz. at 536, 838 P.2d at 1297. After she was tried and convicted, our supreme court reversed the conviction for failure to instruct the trial jury on that statute. *Id*. On remand, as noted above, the trial court denied Korzep's renewed motion to remand for failure to instruct the grand jury on § 13-411.

¶11 Thus, the procedural history in *Korzep* closely parallels the underlying case here. As in this matter, the state argued in *Korzep* that the issue had already been decided. 172 Ariz. at 541, 838 P.2d at 1302. But the court rejected that argument, noting that Korzep "presently faces an entirely new pretrial setting with a more favorable Supreme Court interpretation of A.R.S. § 13-411." 172 Ariz. at 541, 838 P.2d at 1302. That "present procedural status," the court ruled, "dictates a remand for a new finding of probable cause in a context where A.R.S. § 13-411 is available for grand jury consideration." 172 Ariz. at 541, 838 P.2d at 1302. Accordingly, the court in *Korzep* held that the grand jury should have been instructed on § 13-411 and, for that reason, remanded the case to the grand jury for a new determination of probable cause. 172 Ariz. at 542, 838 P.2d at 1303.

¶12 That same reasoning applies here. Under *Thompson*, the premeditation instruction given to the grand jury in 1998 was erroneous. As Sartin argues, that error qualifies as the denial of a "substantial procedural right" for purposes of Rule 12.9(a), and

the state does not expressly argue otherwise. Because the respondent judge's ruling did not rest on any solid basis and conflicts with *Korzep*, it lacked appropriate legal authority and constituted an abuse of discretion. *See* Ariz. R. P. Spec. Actions 3(b)(c), 17B A.R.S.; *see also Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, ¶ 10, 63 P.3d 282, 284-85 (2003) (abuse of discretion occurs when trial court commits error of law in process of reaching discretionary conclusion).

¶13 This determination, however, does not completely dispose of the matter. "Remand of an indictment is appropriate only where the person under investigation is denied a 'substantial procedural right'" and "when actual prejudice is shown." *State ex rel. Woods v. Cohen*, 173 Ariz. 497, 502, 844 P.2d 1147, 1152 (1992); *see also State v. Baumann*, 125 Ariz. 404, 409, 610 P.2d 38, 43 (1980); *cf. Maretick v. Jarrett*, 204 Ariz. 194, ¶¶ 15-16, 62 P.3d 120, 124-25 (2003) (remanding case for new grand jury proceeding when court could not say beyond a reasonable doubt that errors were harmless, i.e., that they had not contributed to the outcome). Sartin implicitly contends the instructional error prejudiced him, arguing that "if the grand jury were correctly instructed on premeditation, and the presentation to the grand jury was not selectively presented, the grand jury would not have indicted [him] on first degree murder."[5] The state does not address the prejudice issue, and

[5]Although Sartin argues "[t]he presentation to the grand jury was far less than fair and impartial," we do not address that issue. If Sartin presented that argument in his 1998 motion to remand, it was rejected already, and that previous ruling constitutes the law of the case. And, if Sartin did not previously make that argument, it is now waived.

we are unable to address or resolve it absent a full record relating to the 1998 grand jury proceedings and motion to remand. *See* n.2, *supra*. Accordingly, we grant relief by vacating the respondent judge's order and direct the respondent to analyze and rule on the issue of prejudice. If Sartin is able to show the instructional error prejudiced him in the grand jury proceedings, then the matter should be remanded for a new determination of probable cause. If no such prejudice is shown, the respondent judge may again deny the motion to remand on that basis.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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GARYE L. VÁSQUEZ, Judge